

JAMES A. KESEL

IBLA 88-538

Decided March 28, 1990

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application ES 035667 (Mich.).

Affirmed.

1. Color or Claim of Title: Generally--Color or Claim of Title: Applications

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based on a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

APPEARANCES: James A. Kesel, Gulliver, Michigan, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

James A. Kesel has appealed from a decision dated May 26, 1988, by the Eastern States Office, Bureau of Land Management (BLM), rejecting his class 1 color-of-title application ES-035667, submitted pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982). The land sought was described in the application as Tracts 37, 38, and 41, in sec. 31, T. 43 N., R. 6 E., Michigan Meridian. These tracts are islands in Potagannissing Bay, which are located in Drummond Island Township, Chippewa County, Michigan. <sup>1/</sup> As a basis for his claim, appellant stated in his application that the tracts were included in his deed, that timber had been harvested from these tracts between 1946 and 1985, and that a relative was buried on Tract 38. He further stated that he first learned he did not have clear title to the land in June 1985.

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<sup>1/</sup> In a cover letter to BLM, appellant refers to the land applied for as "our property on Drummond Island, Michigan." Drummond Island forms a large portion of Chippewa County, Michigan. Tracts 37, 38, and 41 are tiny islands in close proximity to Drummond Island. Although appellant in his application describes the land sought as being 24.5 acres, the three islands are 0.13, 0.34, and 0.28 acres, respectively.

By letter of March 17, 1986, BLM requested appellant to provide copies of all deeds and conveyance documents, since January 1964, pertaining to the islands. Thereafter, in February 1987, appellant filed with BLM a copy of an 1882 patent for sec. 31, between the State of Michigan, as grantor, and the Detroit, Mackinac and Marquette Railroad Company, as grantee. On August 24, 1987, he filed a Form 2540-2, "Conveyances Affecting Color or Claim of Title," listing a series of conveyances for fractional sec. 31 beginning in May 1959 and ending with a quitclaim deed dated May 20, 1974.

Finally, on May 20, 1988, appellant forwarded to BLM copies of two quitclaim deeds, one dated September 23, 1971, between Norman Kesel and Kay Kesel (his former wife), as grantors, and appellant and Dale Edward Kesel, as grantees, and the other dated May 20, 1974, between David Starr and Etta Helen Starr, his wife, as grantors, and appellant and Dale Edward Kesel, as grantees. By each of these deeds, the grantees received an "undivided one-third interest" in "that certain piece or parcel of land situated on Drummond Island in Chippewa County and the State of Michigan, known and described as \* \* \* Fractional Section Thirty One (31), Town Forty Three (43) North, Range Six (6) East, consisting of Twenty-Four (24) and Fifty Onehundredths (50/100) acres, more or less \* \* \*."

BLM's decision states that the islands in question were omitted from the original plat of survey dated January 31, 1846. On January 19, 1856, fractional sec. 31 was patented to the State of Michigan under the Swamp Lands Act of September 28, 1850, as amended, 43 U.S.C. § 981 (1982). On March 8, 1882, the State conveyed fractional sec. 31 to the Detroit, Mackinac and Marquette Railroad Company. BLM's decision indicates that the islands were designated as Tracts 37, 38, and 41 by cadastral survey conducted in 1977 and 1978, and the plat of survey accepted on November 19, 1981. According to the survey plat, the three tracts total less than one acre.

The rationale for BLM's decision is that since the islands were omitted from the original survey, they could not have been included in the 1856 patent to the State and, therefore, they remain public land. BLM found that appellant had not met the color-of-title requirements in that he had failed to produce a deed or other document, predating the application by 20 or more years which purported, on its face, to convey title to the land claimed. It, therefore, rejected the application.

In his statement of reasons, appellant asserts that BLM failed to consider his good faith. He states that the land was posted against trespass in 1953, and that the signs, which are still in existence, constitute improvements. He also explains that the remains of his uncle, a former owner of the property, have been "located on Tracts 37 and 38" since 1958. He reiterates that timber was harvested from the land, and also suggests that BLM improperly ignored the 1882 patent to the railroad.

[1] The Color of Title Act, 43 U.S.C. § 1068 (1982), provides in pertinent part, that:

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on the land or some part thereof has been reduced to cultivation \* \* \* issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre.

Absent an individual's showing that he or she has complied with the requirements of the Color of Title Act, unauthorized use and occupancy of land owned by the United States, even if in absolute good faith, affords no rights to that land. See, e.g., United States v. Osterland, 505 F. Supp. 165 (D. Colo. 1981).

In order to satisfy the statutory requirements for a claim of class 1, appellant must show that Tracts 37, 38, and 41 have been held in good faith and in peaceful, adverse possession by himself or his predecessors, under claim or color of title for more than 20 years. In this regard, the Board has noted that a claim or color of title "must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title." Marcus Rudnick, 8 IBLA 65, 66 (1972); see also Agee L. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987). Moreover, this deed or other writing must "on its face" purport to convey title to the land described in the application. Louis Mark Mannatt, 109 IBLA 100, 103 (1989); see Wilbur C. Nemitz, 97 IBLA 121, 124 (1987); James E. Gaylord, Jr., 94 IBLA 392, 397-98 (1986). As the Board has noted, "the instrument of conveyance upon which an applicant relies is sufficient to provide color of title only if it describes the land conveyed with such certainty that the boundaries and identity of the land may be ascertained." Charles M. Schwab, 55 IBLA 8, 11 (1981).

The two quitclaim deeds produced by appellant show that during the 1970's he and another party (Dale Edward Kesel) acquired an undivided two-thirds interest in 24-1/2 acres of land described as fractional sec. 31. There is no mention in either of those deeds of the three islands, now described as Tracts 37, 38, and 41. Since they fail to describe the lands sought, those deeds are not a sufficient basis to support a claim or color of title. See Loyla C. Waskul, 102 IBLA 241, 244 (1988). The deeds are also deficient because they fail to establish a claim of title for 20 years. 2/

To the extent appellant may be arguing that the islands in issue were included in the 1882 patent of fractional sec. 31 from the State to the railroad company, such an argument is inconsistent with the filing of

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2/ Moreover, the evidence produced by appellant shows only that he and another individual acquired an undivided two-thirds interest in fractional sec. 31. Thus, even if the deeds relied on could be the basis for a color-of-title claim, appellant has not shown that he is the only person with a claim to ownership of the islands.

a color-of-title application. The filing of a color-of-title application is an acknowledgement that title to the land sought is in the United States and that the applicant seeks to have the United States convey title to him. Loyla C. Waskul, supra at 243-44. Here, it appears that appellant is arguing that the islands were always part of fractional sec. 31 and that conveyances affecting title thereto, which originated with the United States, also passed title to the islands. If that were so, appellant would be a part owner of those islands based on his chain of title to fractional sec. 31, and it would not be necessary to file a color-of-title application. 3/

Finally, appellant's good faith is not doubted. However, his belief that the tracts were included as part of the lands conveyed by the quitclaim deeds does not give rise to a claim or color of title. Loyla C. Waskul, supra at 248. Since appellant has failed to show a chain of title of more than 20 years based on an instrument which, on its face, purports to convey the land in question, appellant has not met his burden of proof and BLM properly rejected his application. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Administrative Judge

I concur:

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Charles B. Cates  
Director, Ex Officio Member

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3/ In a similar situation in Loyla C. Waskul, the Board explained:

"If appellant wishes to assert that she has actual title to land in issue, she must do so in an action directly challenging the survey. The survey, however, is not subject to collateral attack in the present proceeding." 102 IBLA at 244.

4/ The record indicates that although BLM is giving consideration to selling the islands to appellant (apparently through a sale in accordance with 43 CFR Subpart 2710), all the islands were included in a Recreation and Public Purposes Act application (MIES-31779) filed by the Michigan Department of Natural Resources. In a June 30, 1988, letter to the State, BLM questioned whether the State desired to maintain its application as to those islands. The file contains no response to that letter.